

Developments in Indian Administrative Law

Upendra Baxi

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POWER ACCOUNTABILITY AND LAW

Even a bare review of the general principles of administrative law in India is a daunting exercise. This is not just because the law is developing as a series of *ad hoc* judicial responses to the problems of structuring and confining administrative power and discretion. What really makes the exercise daunting is that the struggle to control excesses of power and discretion in India goes beyond instant outcomes and general trends in legal doctrines. It rather extends to the task of imbuing the holders of public power and authority with a spirit of legality and fairness through judicial insistence on accountability. It is doubtful whether courts anywhere have been powerful instrumentalities of generating an ethos of legality in the exercise of public power unless they are aided by an overall political order maximizing the value of accountability. In India, the lack of a stable two-party system, the failure to create appropriate mechanisms—such as the ombudsman or a

system of tribunals—has exposed the courts to the burden, not just of rectifying everyday excesses of administrative power, but also of creating and sustaining an ethos of legality and fair play in the use of public power. To understand whether this could ever happen through the judicial process is as important as it is to understand how the excesses of power are episodically combated through judicial review. Traditional writing on administrative law concentrates almost wholly on the second aspect. We endeavour to look at both these aspects in a general account of administrative law developments in India.¹

Another chapter in this volume deals with the evolution of concepts and techniques by which the courts in India have, through constant reinterpretation of judicial powers under the Constitution, managed the exercise and excesses of ad-

¹I rely here on the following principal treatises on administrative law in India: MP. Jain and S.N. Jain, *Principles of Administrative Law*, 1973, 3rd edn., Tripathi; M.C.J. Kagzi, *The Indian Administrative Law*, 1973, 3rd edn., Metropolitan; S.P. Sathe, *Administrative Law*, 1974, 2nd edn., Tripathi; lamented A.T. Markose's *Judicial Control of Administrative Action in India*, 1956, *Madras Law Journal*, hailed as the first work of its kind in the common law world, and, the Indian Law Institute's *Cases and Materials on Administrative Law in India*, 1966, Tripathi present worthwhile perspectives on the evolution of administrative law in India. A comparative survey is provided by M.A. Fazal, *Judicial Control of Administrative Action in India and Pakistan*, 1969, Oxford. All these works will be hereafter cited by the author. For contemporaneous accounts of developments in this area, consult the *Annual Survey of Indian Law*, Indian Law Institute and contributions to the *Journal of the Indian Law Institute*, hereafter referred to respectively as A.S.I.L. and J.I.L.I.

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ministrative power.² In this chapter, we try to deal only with the evolution of some specific principles and doctrines of fairness, rather than with the processes or problems of activation of remedy structures for actual relief.

²See the contribution by D.K. Singh to this volume.

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THE RULE OF LAW NOTION AS GROUNDNORMS OF ADMINISTRATIVE LAW

The concept of the “rule of law” is the mainspring of the principles of administrative law. Over a period of time, the concept has been operationalized as meaning absence, or at any rate diminution, of arbitrariness in the exercise of public power. The Constitution embodies many facets of this concept in several of its provisions, including those of Part III which guarantee fundamental rights. The Indian experience is rather unique in that the courts, and particularly the Supreme Court, had to pronounce their understandings of the concept repeatedly. In *Kesavananda*³ there occurred a refreshing dialogue on the issue whether the concept of the rule of law was itself an aspect of the doctrine of basic structure of the

³*Kesavamanda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

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Constitution, which even the plenary power of Parliament cannot reach to amend. The dialogue continued among justices of the Supreme Court during the internal emergency of 1975–77. In *Indira Nehru Gandhi*⁴ an amendment to the Constitution (immunizing the election dispute involving the Prime Minister from any kind of judicial review), was invalidated by Khanna and Chandrachud, on the ground that it violated the concept of the rule of law, which was an aspect of the basic structure. Other Justices did not take this route to invalidation complaining in essence that the concept cannot possess a “brooding omnipresence over the specific provisions of the Constitution. In the *Habeas Corpus* case,⁵ the argument was pressed that the executive cannot even in times of an emergency, entailing suspension of the bill of rights, act in violation of the concept of the rule of law as the “obligation to act in accordance with the rule of law ... is a central feature of our constitutional system and is a basic feature of the Constitution”. Although there was some confusion as to the status of the concept during the period of the emergency and some justices went so far as to suggest that the emergency provisions themselves constitute the rule of law during such a regime, the opinions closely read do suggest the conclusion that the contention of the petitioners was accepted in the reasoning of all the five opinions, though unfortunately not in result.⁶ The result was a carelessly drafted order, as the

⁴*Indira Nehru Gandhi v. Raj Narain*, AIR. 1975 S.C. 2299.

⁵*A.D.M. Jabalpur v. Shukla*, A.I.R. 1976 S.C. 1207.

⁶H.M. Seervai, *The Emergency, Future Safeguards and the Habeas Corpus case*, 45, 1978, Tripathi; U. Baxi, *The Indian Supreme Court and Politics*, 1980, Eastern Book Company.

court was itself to later so characterize,⁷ which left detenus with no remedy against any arbitrary exercise of authority. But despite this distortion, whose severe consequences were tragically documented in a denial of all judicial relief even as regards the conditions of detention,⁸ Kesavananda, Indira Gandhi and the Habeas Corpus cases provide a distillation of Indian judicial thought on the conceptions of the rule of law, which has evolved well over a quarter century. References to Western theories and thinkers from Dicey onwards abound in these opinions; but these occur by way of rhetorical flourishes, masking the typically Indian approaches.

When one reflects upon decisional law in this area, one finds that the concept of the rule of law thus developed has several components. One is that power should not be exercised arbitrarily. This has meant that it should be exercised for the purposes for which it has been conferred.⁹ It also means that power should be exercised within the statutory ambit; and purported exercise of it would not just be ultra vires but, in a true sense of the term, arbitrary. Simple negation of arbitrariness is, however, not enough to preserve the rule of law values. Indian courts have gone further to insist on specific positive content of the rule of law obligations. These include the rules of natural justice which have to be followed not just in quasi-judicial action but often also in purely administrative action.¹⁰ The scope and content of the

⁷ See Mr. Justice Beg's observations in *In re Sham Lal*, 1978 S.C.C. 479.

⁸ *Union of India v. Bhanudas*, AIR. 1976 S.C. 1207.

⁹ E.g. *State of Bombay v. K.P. Krishnan*, AIR. 1960 S.C. 1223.

¹⁰ See section V, *infra*.

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requirements of natural justice have varied from time to time according to the judicial interpretation; but the broad insistence remains. In addition, access to information as to the grounds of decision has remained an important preoccupation of the Indian judiciary, as any impediments to it have the tendency of obstructing judicial review of administrative action. This means that the courts have from time to time insisted that exercise of administrative power be accompanied by reasons,¹¹ although the exact status of the obligation to give reasons is as yet indeterminate.¹²

The rule of law notion has been in addition consistently extended to secure for the individual fair dealing by the State in its economic activities. For example, the government is held bound by its assurances to individuals in business transactions by way of estoppel.¹³ The State has to follow some of the rules of natural justice before reaching a decision that it would not trade with certain contractors or before black-listing them.¹⁴ In matters involving government contracts, the courts have been increasingly keen to insist that the ambit of fairplay is not lessened in view of the dominating capacity of the State over the individuals.¹⁵ In the area of losses and injury arising out of the State economic entrepreneurial function, courts have tended to restrict the scope of the defence of sovereign immunity in favour of the affected individuals.¹⁶

¹¹ See generally section V.

¹² See note 111 and text accompanying, *infra*.

¹³ See notes 125, 126 and text accompanying, *infra*.

¹⁴ See note 128, *infra*.

¹⁵ See section X, *infra*.

¹⁶ See section XI, *infra*.

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We review the decisional law on some of these matters in this chapter. Suffice it to say here that the rule of law concept as evolved by the Indian judiciary extends not just to providing a framework of negative constraints on governmental action but also to impositions of specific fairness duties on the State. In quite a few respects, then, the Indian administrative law transcends the inspiration and models of judicial intervention found in cosmopolitan jurisprudence of Anglo-American decisional law; although judicial discourse remains suffused with quite deceptive reliance on these very sources.

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THE SEPARATION OF POWER

The separation of powers doctrine, as an emanation of the rule of law values, has been a discrete area for judicial pronouncements in India. It has been acknowledged in a long line of Indian decisions that the Constitution does not envisage any strict separation of powers. Apart from the directive principle embodied in Article 50 which enjoins separation of judiciary from executive, the constitutional scheme does not countenance any dogmatic division of powers. For example, the President of India has wide legislative powers. Of his wide power to promulgate ordinances during the recess of the Houses of Parliament, it has been said that its “extent and scope ... would have been envied by Henry VIII and would have taken the Judges of the Case of Proclamations by surprise”.¹⁷ The system of Presidential rule in the states provides another example.¹⁸ When the separation of powers doctrine was urged in the fifties as denying, or in the alternative substantively

¹⁷Kagzi, p. 20.

¹⁸See R. Dhavan, *President's Rule in States*, 1978, Indian Law Institute.

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restraining, wide grants of delegated legislative powers to the executive, the Supreme Court upheld such delegation, subject to certain limitations, but in essence denying the existence of the doctrine in the Indian constitutional scheme.

Apart from the difficulties in contemplating and maintaining any rigid doctrine of separation of powers in contemporary conditions, with declining role of legislative institutions in the domain of lawmaking and the progressively increasing domination in all spheres by the executive, there is also the inherent difficulty in defining in workable terms the division of powers into legislative, executive and judicial. Experience has shown (e.g. the tortuous endeavours to distinguish quasi-judicial from administrative power) that even if the doctrine of separation of powers were to be grasped as merely involving division of functions, demarcating lines among the various functions of the government are equally difficult to draw. The Supreme Court has made recently one valiant attempt to identify the essential feature of judicial power—namely adjudication of specific disputes—which it denied to the constituent body, that is Parliament, acting under the amending powers of the Constitution by virtue of Article 368.¹⁹ But this effort, problematic as it is at its own intrinsic level,²⁰ is not of decisive relevance for the development of administrative law though it may be so for the exercise of constituent power itself in the future.

¹⁹Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299.

²⁰U. Baxi, "Some Reflections on the Nature of Constituent Power" in R. Dhavan and A. Jacob (ed.), *Indian Constitution: Trends and issues*, 1978, p. 122.

DELEGATED LEGISLATION

The important issue concerning the constitutionality of delegated legislation arose soon upon Independence in the Supreme Court's advisory opinion in the Delhi Laws case.²¹ Prior to Independence, the doctrine of conditional legislation held sway by virtue of the landmark ruling of the Privy Council in *Queen v. Burah*.²² Conditional legislations granting executive many powers—for example to extend the life of the Act by a period, or to bring into force an Act duly passed or to extent the pecuniary jurisdiction of civil courts to a precise maximum amount—were upheld, although with circumspection.²³

Upon the adoption of the Constitution, the question of the constitutional validity of delegated legislation was argued

²¹*In re Delhi Laws Act*, A.I.R. 1951 S.C. 332.

²²(1978), 3 A.C. 889. *Also see* Sathe, pp. 69–74.

²³E.g., *Inder Singh v. State of Rajasthan*, A.I.R. 1957 S.C. 510; *Emperor V. Benoari Lal*, AIR. 1945 P.C. 48; *State of Bombay v. Narottamdas*, AIR. 1951 S.C. 69

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at great length in advisory proceedings in Delhi Laws. The Central government was not merely authorized to extend to the Union territory of Delhi laws existing or to be made in future by any State but, if necessary, to adapt and modify these. The authorization extended beyond extensive modifications of such laws to the repeal of any existing laws in force in the territory and their substitution by other laws from time to time. The scope of delegated legislation thus entailed was very wide indeed.

In a complex set of opinions, the Supreme Court negatived the contention that the doctrine of separation of powers forbade delegation of legislative authority. The argument that the legislature was an agent of the people and cannot further delegate its lawmaking powers was explicitly rejected. If delegation of power to the executive was not *per se* invalid, was there to be no limit to the powers that can be delegated? The Court formulated the general limit of delegation in terms of a broad formula; what cannot be delegated, it said, is the essential legislative function. This function consisted in the “determination of legislative policy and its formulation as a rule of conduct”²⁴ Excessive delegation would arise when the legislature left the executive to perform even these tasks. But the application of this general test was no easy affair even in the very case in which it was formulated. The power to extend without modification Central and Provincial Acts, both

²⁴Per Kania, C.J.; *see also* Harishankar Bangla V.M.P. State, A.I.R. 1954 S.C. 465, 468 where the essential legislative function was formulated as consisting in “the determination or choice of legislative policy and of formally enacting that policy into a binding rule of conduct”.

present and future, was upheld by five votes to two. The authority to apply existing and future legislations with alterations and modifications was also similarly upheld. The power to repeal existing laws and to substitute new ones was held *ultra vires* by a narrow margin in a four to three vote. Three Justices formulated limits of delegation of legislative power more generously at “effacement” or “abdication”. Parliament may not destroy its legislative powers by delegation; it may not abandon its control over the delegate; nor may it create new legislative power not contemplated in the Constitution. In each of the three situations the charge of excessive delegation would be attracted.²⁵ Neither the test of abdication nor that of “essential legislative function” helped the Court to arrive at a unanimity of outcome in any of the categories presented to it in this reference.

A large number of subsequent decisions has shown that it is difficult, in practice, for anyone to sustain the charge of excessive delegation. Whether the legislature had performed the task of formulating the legislative policy while making the grant of wide delegated powers of rule-making to the executive is a question which the courts have answered, again and again, by discovery and imputation of policy to legislations which *ex facie* did not disclose these.²⁶ All too often even the vaguest declarations of policy intent and objective in the preambulatory recitals have been considered sufficient for the purposes of sustaining delegated legislation. Rarely has a

²⁵ See the summation of outcomes in the Delhi laws in *Raj Narain v. Chairman, Patna Administration*, A.I.R. 1954 S.C. 569.

²⁶ Jain and Jain, pp. 33–48.

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judge taken pains to declare that the essential legislative function cannot be performed “by vague and general declaration of policy” but that it required a definite policy controlling and regulating the powers conferred on the executive for carrying into effect that policy”²⁷ But even such declaration has been made only in a dissenting opinion. As late as 1974, Mr. Justice Mathew felt that the dignity of judicial process is impaired by judicial attempts to somehow find the formulation of essential legislative policies in the vacuous generalities of the delegating statutes. He observed that “the hunt by court for legislative the policy or guidance in the crevices of a statute or nook and cranny of its preamble is not an edifying spectacle”²⁸ He proposed the test (and was himself to apply it in a problematic decision later) that counts may invalidate delegation of legislative power only when there is a clear showing of abdication of legislative power by the legislature, indeed to a point that it has foregone even its power to repeal or revoke the power from the delegate.²⁹ In the result, a very wide judicial benediction to transfer of legislative power to the executive continues unabated.

For example, the entire structure of regulation of import and export trade is built on the skeletal statute of eight sections; the regulatory process on the Essential Commodities

²⁷ See the dissenting opinion of Justice Subba Rao in *Vasantlal Maganbhai v. State of Bombay*, AIR. 1961 S.C. 4.

²⁸ *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. A.C.S.T.*, (1974) 4 S.C.C. 98, 122; AIR. 1974 S.C. 1660.

²⁹ *M K. Papiiah & Sons v. Excise Commissioner*, A.I.R. 1975 S.C. 1007; see U. Baxi, Introduction’ to K.K Mathew’s *Democracy, Freedom and Equality* pp. xxvi-xxvii, and pp. iii-v, 1977, Eastern Book Co.

Act springs from a similar skeletal statute of sixteen sections.³⁰ The bulk of delegated legislation is on constant increase. For example, the Indian Parliament passed from the period 1973 to 1977 a total of 302 laws; as against this, the total number of statutory rules and orders (on a rough count) passed in the same period was approximately 25, 114. Corresponding figures for states and union territories are not available; but the number of rules issued under delegated power may well be astronomical.³¹ In a recent decision, the Supreme Court has acknowledged this magnitude of executive power but has not been able to find any strategy of coping with it.³²

Nor is this all. There exist no functional equivalents of judicial control over executive law-making, either. No doubt, some sort of legislative control over this power is exercised by the Committees on Subordinate Legislation of both Houses of Parliament. On available information, the Committees do useful work in raising questions concerning the vires of certain rules or procedures, provide suggestions for additional procedural safeguards and issue general guidelines from time to time (such as the need for publication, to limit ouster or restriction of judicial review, and for provision of standards structuring discretion). All this is no doubt useful.³³ The question whether this procedure does effectively control excessive

³⁰ See Jain and Jain, pp. 33–36.

³¹ See U. Baxi, *The Crisis of the Indian Legal System*, Vikas Publishing House, New Delhi, (Alternatives in Development: Law, mimeo, being a paper presented for the Indian Council of Social Science Research, at a workshop at Poona University, June 1976).

³² *Avinder Singh v. State of Punjab*, (1979) 1 S.C.C. 137, 160.

³³ Jain and Jain, pp. 57–66; Sathe, pp. 108–16.

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delegation and sub-delegation and actual exercise of powers is a different one and remains open for empirical investigation. In any case the Committees have no censorial role on the policies underlying the rules. We have little corresponding information on the mechanism of legislative control over delegated legislation in the States. One may venture to presume then that the extent of delegated legislation, uncontrolled either by judicial or legislative oversight, is very large indeed. There is in India no *a priori* ground compelling the conclusion that such untrammelled powers of executive lawmaking are essential for the attainment of the goals of the Constitution or for attaining administrative efficiency, although this is offered, parrot-like, as the justification for such powers. On the other hand, there is ample indication that people affected by exercise of delegated legislative power have no real access to executive law which may determine their status adversely; the requirement of publication in the official gazette, although salutary, just does not structure effective access to information through the vastness of India.³⁴ The absence of legal services programmes is another aspect of the access problem, which gets aggravated especially when executive legislation occurs in the area of redistributive equities.³⁵ The inability of devising appropriate controls over this is an aspect of the current crisis of the Indian legal system.

³⁴The courts have done their best to insist on publicity through gazette. *See* the recent decision in *Govindlal v. Agricultural Produce Market Committee*, A.I.R. 1976 S.C. 263.

³⁵*See* U. Baxi, "Legal Assistance to the Poor: A Critique of the Expert Committee Report", 1975, *Economic and Political Weekly*, p. 1005.

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With very wide powers of delegated legislation also marches conferral of vast discretionary powers in the administration. Administration does not merely have the rule-making power; it has also the power, through subordinate, legislation, to confer further discretionary power upon itself through such rule-making. It is true that often the legislature itself provides for wide discretion for specific authorities. But it is the former method of creating and extending discretion which has come oftener before the Indian courts.

The courts have, however, almost consistently, repelled challenges to conferral of vast, and even unbridled, discretionary powers on the administration. These challenges have usually been made on the ground that such conferral violates either the provision of “equality before the law” guaranteed by Article 14 or reasonableness of restrictions on the seven freedoms guaranteed by Article 19 or the residuary “rights” of detainees articulated by Article 22 of the Constitution.³⁶ As with the challenges to the plea of excessive delegation, the Indian courts have, by and large, found that the conferral of

³⁶See Jain and Jain, pp. 262–300.

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vast discretionary powers to be usually accompanied by statement of policy or guidance, whether in its preamble or general purposes. No precise delineation of policy or guidance is usually insisted upon; even the most general indications are held sufficient.³⁷

This is not to say that Indian courts have never invalidated what appeared to them to be genuinely arbitrary conferral of discretionary power. But they have done so only where the arbitrariness of the conferral is writ large on the face of the provision. For example, when a licensing authority was given power in absolute terms to grant, revoke or suspend a licence, without any rules to guide it in exercise of the discretion, without any reviewing authority and without any policy which the court could gather from the statutory text, the Supreme Court invalidated the provision.³⁸ Similarly the discretionary power given to an authority to declare an association unlawful on its subjective satisfaction and precluding judicial review of the action through the substitute device of advisory board review was held to be a violation of the fundamental right to form associations under Article 19 (1) (C) and (d).³⁹ Where a Commissioner of Police was authorized to give permission for processions in public places and the permission was mandatory on the processionists, the unfettered power to refuse permission without procedural safeguards and scope for review was held bad against the guaranteed

³⁷ *Cf.* Jain and Jain, p. 264; Sathe, pp. 193–202.

³⁸ *Dwarka Prasad v. State of U.P.*, A.I.R. 1954 S.C. 224.

³⁹ *State of Madras v. V.G. Row*, A.L.R. 1952 S.C. 169.

right to assemble under Article 19 (1) (b).⁴⁰

But as against these, there are a very large number of instances where discretionary powers conferred in wide terms have been sustained. Very often, the general objective and policy of the statute are considered sufficient. The very wide governmental power of referring industrial disputes for labour adjudication vested with the State by the Industrial Disputes Act, 1947, has been sustained by the court on the ground that the nature of disputes is very varied and reference to industrial adjudicatory bodies by the government must be left to its "best discretion"; no plea of violation of Article 14 guarantee could thus be raised in this kind of situation as no reasonable classification is deemed possible here.⁴¹ In the area of agrarian reforms, the power of the State Governments to abolish at its discretion any one estate or group of them,⁴² or to protect certain classes of tenants against ejectment⁴³ were held valid as being in pursuit of the directive principles of state policy and on the ground that certain degree of discretion was necessary and justified in situations. Even the power to transfer of tax cases from one jurisdiction to another, without any duty to record reasons and without any other procedural safeguards, was considered justifiably conferred on the ground of administrative convenience.⁴⁴ So has been the power given to the executive to refer certain cases to special (as against

⁴⁰Himat Lal v. Police Commissioner, Ahmedabad, AIR. 1971 S.C. 481.

⁴¹Niemia Mills Ltd. v. Second Punjab Tribunal, AIR. 1957 S.C. 329.

⁴²E.g. Biswamber v. State of Assam, A.I.R. 1954 S.C. 139.

⁴³E.g. Inder Singh v. State of Rajasthan, A.I.R. 1957 S.C. 510.

⁴⁴Pannalal Binjraj v. India, A.I.R. 1957 S.C. 397.

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normal criminal) courts established by the statute.⁴⁵

Even when courts have found that the guidance or policy enunciated in the statute conferring discretionary powers (or delegated legislation) is too wide, the availability of procedural safeguards is held to be sufficient safeguard against abuse of power. Duty to record reasons or provide a hearing or some kind of review of the initial decision have been, singly and conjointly, pressed in aid of holding valid such wide charters of discretionary powers.⁴⁶ It has been rightly said that the insistence on statement of policy (discovered even in the preambulatory recitals by courts) has led to a large scale validation of wide conferrals of discretionary powers and the “standard accepted as sufficient has been so general and vague that it is doubtful whether it serves any useful purpose by way of controlling administrative discretion”.⁴⁷ Such control that exists testifies to the trend towards the “preferred freedoms” approach. As regards the fundamental rights to speech and association (as against the rights to movement” and “residence”) the “judiciary has insisted on more substantial safeguards”. In matters of price-fixing and licensing affecting trade and property courts have consistently sanctioned wide discretionary powers. But the “safeguards” are not in the long run, all that substantial, either.⁴⁸ On the other hand, one finds much greater judicial activity on the question of the actual exercise of discretionary power by the administration. Courts

⁴⁵ See the discussion of relevant case law in *In re Special Courts Bill*, 1978, (1979) 1 S.C.C. 380.

⁴⁶ Jain and Jain, p. 265.

⁴⁷ *Ibid.*, 298.

⁴⁸ *Ibid.*, pp. 298–300.

have insisted that the exercise of discretionary powers should be in accordance with the law. For this purpose, exercise of power in a mala fide manner or for an "improper" purpose or on the bases of exclusion of relevant consideration or inclusion of irrelevant ones, or "unreasonable" or "colourable" exercise of power cannot be considered as actions under the law. For, clearly such actions cannot be ever said to be authorized by the statute. Each of these and related heads of abuse of power have been tolerably clearly established in Indian administrative jurisprudence, and methods have been found to ascertain the facts on the basis of which discretionary power has been exercised in each litigious situation. We will turn to these details in a little while.

But before we do so we ought to stress that such judicial invigilation over the exercise of power as occurs is held within the bound of the self-denying ordinance that courts will not examine the merits of administrative decisions.⁴⁹ They will not presume to decide the policy alternatives available to the holders and exercisers of discretionary powers. As is frequently said by courts whenever exercise of administrative power is subject to the subjective satisfaction of the authority, they will not substitute their own satisfaction. At the very most, they would quash an administrative action in contravention of the law. But they would not, ordinarily, "direct the authority to act in a particular manner".⁵⁰

⁴⁹The leading case here is *Arora v. U.P.*, A.I.R. 1964 S.C. 1230.

⁵⁰*Jain and Jain*, p. 381. But the Supreme Court in *State of Kerala v. P. Roshana*, A.I.R. 1979 S.C. 765 has boldly departed from this posture and directed affirmative action on the part of university of Calicut to admit thirty students to the medical college. It also directed the two con-

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We now review, briefly, the categories of abuse of discretion and judicial responses to it. The first and the least used category is provided by *mala fides*, in the strict sense of personal animosity or bad faith on the part of the decision-maker against the aggrieved individual. Clearly, an action *mala fide* is outside the purposes and powers of the statute and therefore *ultra vires*. But an action may *ex facie* be *intra vires* and yet be vitiated by *mala fides*, as when the order for dismissal, upon disciplinary action, by government may be *intra vires* and yet be actuated by *mala fides* in the strict or limited sense. There have been very few cases in which the charge of *mala fides* has been sustained; interestingly some of these involved either the Chief Ministers of the State⁵¹ or high police officials.⁵² The paucity of cases does not indicate that in India *mala fides* administrative action is rare. Rather, it is indicative of the fact that the judicially evolved standards for the burden of proof for establishing *mala fides* are unusually stringent. The burden is on the individual making the allegation to prove it. The individual has to prove the *mala fides* motive of the official. Direct evidence is rarely available. The second order evidence has, however, to be such as to establish a “reasonable and inescapable inference”⁵³ of *mala fides*. Such inference can, and has been, easily drawn when there is failure to file affidavit in response to the charges; but

cerned universities to evolve uniform curricula and common examination programme within specified time limits.

⁵¹*Rowjee v. Andhra Pradesh*, A.I.R. 1964 S.C. 962; *Pratap Singh v. Punjab*, A.I.R. 1964 S.C. 72.

⁵²*C. Sadanandan v. State of Kerala*, A.I.R. 1972 S.C. 1004.

⁵³Note *Pratap Singh v. Punjab*. A.I.R. 1964 S.C. 72, 84.

otherwise a pattern of behaviour has to be demonstrated, a pattern both of public utterances and a course of events. The constricting rule of direct evidence can be countered by reliance on the doctrine of judicial notice; but this rarely takes place, even in calamitous situations. In the 1975–77 emergency, the Court could have taken judicial notice of the fact that a number of actual detentions were *mala fides*⁵⁴ but it kept open the possibility only at a notional level.

The second category of judicial control is provided by the doctrine of “improper purpose”. This category is hard to define but available case law, miniscule though it is, suggests that this plea will vitiate administrative action when it can be shown that the authority has acted to serve public purposes outside the statute. The purposes sought to be served are, in contrast to *mala fide* actions, public purposes but they are not within the regime of purposes sanctioned by the statute under which action is purported to be taken.⁵⁵

A related category is that of acting on “irrelevant considerations”. Extraneous or irrelevant considerations have been held to vitiate exercises of discretionary authority. For example, the refusal by a government to refer an industrial dispute for labour adjudication, on the ground that the workers had resorted to a “go slow” strike was held to be a punitive denial not within the range of relevant considerations authorized by the law.⁵⁶ Similarly, the power to acquire land “needed for construction of a work. ... likely to prove useful to the pub-

⁵⁴ See Seervai, *op. cit.*, *supra*, footnote 6.

⁵⁵ Jain and Jain, pp. 389–97.

⁵⁶ See footnote 9, *supra*.

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lic” under the Land Acquisition Act, 1894, was not permitted to be used to acquire land so that the government could in turn give it to a private company for construction of parts for textile machinery. The court held that the land acquired for public purpose must be directly useful to the public and not indirectly through the future work of some other agency. Such was not the authorization of the Act; consequently, the governmental action was vitiated.⁵⁷ In preventive detention cases, courts have quite frequently, and strictly, applied the doctrine of acting on irrelevant considerations.⁵⁸ It is in this latter area that the courts have taken a much stricter view of the administrative action and struck down orders of detention which proceeded on mixed considerations, that is, orders based on relevant as well as irrelevant grounds. The courts have held that even one irrelevant ground for detention is enough to negate other quite relevant grounds for ordering detention under relevant statutes because it is impossible to disengage grounds predominating the decisional outcome by the concerned authorities.⁵⁹ The richness of what has been called “detention jurisprudence” testifies to how effective judicial control over administrative action could really be.⁶⁰

⁵⁷R.L. Arora v. State of U.P., A.I.R. 1962 S.C. 764: *see also* Narayan v. State of Maharashtra, A.I.R. 1977 S.C. 183.

⁵⁸Jain and Jain, p. 397–99: and *see* references in footnote 60, *infra*.

⁵⁹*Ibid.*

⁶⁰*See* M.P. Jain, “Judicial Creativity and Preventive Detention in India”, (1975), J. of Malayasian & Comp. Law, 261; P.K. Tripathi, “Preventive Detention: the Indian Experience”, (1960) 9 Am. J. Comp. L. 219, M.C.J. Kagzi, “Judicial Control of Executive Discretion under Preventive Detention Law: an Indian Experience”, (1965) Public Law 30; C.M. Jariwala,

But outside this arena, courts have been reluctant to extend the doctrine of irrelevant and mixed considerations.⁶¹

Just as introduction of irrelevant considerations may vitiate exercise of discretionary power, so may leaving out relevant considerations expose discretionary action to judicial invalidation. Obviously, the plea that the authority has been inadvertent to a relevant consideration is not going to be an easy one to sustain; but in a few cases the plea has succeeded.⁶²

A fourth category for judicial control is provided by the language of reasonableness in the exercise of administrative discretion. The implicit idea is that the authority must act reasonably. In a sense, this cannot be a separate and additional requirement to the grounds already mentioned; for, the doctrines of mala fides, irrelevant and mixed considerations, and others, constitute an emanation from the principles of reasonableness. So it is doubtful whether a plea of unreasonable exercise of power can be raised simpliciter, on its own terms, outside the constitutional and statutory contexts which prescribe these requirements for the reasonable exercise of power. Articles 14 and 19, both fundamental rights provisions, so provide; many statutes also embody a standard of reasonableness. In such contexts, it is open for courts to examine whether the standard of reasonableness, as construed

“Preventive Detention in India: Experiences and Suggested Reforms” and V.S. Rekhi. Preventive Detention: Need for Substantive Reforms” in R. Dhavan and A. Jacob (eds.) *Indian Constitution: Trends and issues*, 1978, pp. 203, 216; respectively Tripathi.

⁶¹ See the clarification in *State of Uttar Pradesh v. Chandra Mohan*, A.I.R. 1977 S.C. 2411.

⁶² Jain and Jain, pp. 400–1.

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by it from time to time, has been met. Indian courts have held, after some initial hesitation,⁶³ that a law may be valid against the test of fundamental rights and yet a discretionary exercise of power may be invalid, being unreasonable.

Several statutes provide for subjective discretion of authorities by phrases such as reasonable belief” or “satisfaction” or “in the opinion of the authority” as a ground of action. In such situations, courts have to determine whether or not to accept the recital of statutory grounds in the order as sufficient to validate the administrative action (which can then only be open to attack on grounds other than reasonableness such as so far enumerated). In a landmark decision in 1967, the Supreme Court by a thin majority asserted that such recital would not be considered adequate for the purpose of judicial scrutiny. The case concerned appointment of investigators under Section 273 (b) of the Indian Companies Act, 1956. This provision empowered appointment of investigators by the Central government “if in the opinion of the government there were circumstances suggesting that: (i) the business of the company was being conducted with an intent to defraud its creditors, members or any other persons; (ii) the persons concerned with the formation of the company or its management were guilty of fraud or misconduct towards the company or any of its members and (iii) the members of the company were not given all the information with respect to its affairs. The Central government had delegated the power to so determine, and proceed with the appointment of investigators, if necessary, to the Company Law Board. The

⁶³ See *Dhanraj Mills v. B.K. Kocher*, AIR. 1951 Bom. 132.

majority held that the "circumstances suggesting" any of the three possibilities must objectively exist; this was a prerequisite of formation of "subjective opinion" and the exercise of discretionary power. The satisfaction was thus open to challenge, *inter alia*, on the basis that the grounds given by the government are such that no one can reasonably arrive at subjective satisfaction on their basis so as to justify the exercise of discretionary powers. The minority opinion, fully advertent to earlier rulings of the court, held that the opinion formation was itself a subjective process and was therefore immune to judicial scrutiny unless it disclosed specific grounds for the action or was proved *mala fide*.⁶⁴

There is some doubt, however, that the courts will import the requirement of reasonableness as distinct and separate in adjudicating the validity of discretionary action when the statute does not provide any standards of reasonableness or is silent on the issue.

The fifth category, covering various notions, may be grouped under the rubric "abdication of discretion", which may arise in several ways. First, persons invested with discretion may surrender whole or part of their discretion to other authorities; this has been held impermissible.⁶⁵ Second, the persons invested with discretion may, without actually

⁶⁴ See the landmark decisions in: *Burium Chemicals Ltd. v. Company Law Board*. AIR. 1967 S.C. 295; *Rohtas Industries Ltd. v. S.D. Agarwal*, A.I.R. 1969 S.C. 707.

⁶⁵ The question arose at the constitutional level in *Kesavananda Bharati*, *supra*, footnote 3, as to whether the new Article 31 C was invalid because it "abdicated" the power to amend the Constitution vested in certain respects with Parliament in favour of State.

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surrendering it in form, exercise it under superior orders. "Acting under dictation" or directions has also been held impermissible, on the ground that the authority concerned must apply its own mind to the decisional situation and that it should not act "mechanically and without due care".⁶⁶ Third, prior determination of rules or policies to be rigidly and uniformly applied to all cases also signifies impermissible exercise of discretion, when the statute provides standards for exercising discretion to be applied case by case. "Generally speaking, an authority entrusted with a discretion must not, by adopting a rule or policy, disable itself from exercising its discretion in individual cases".⁶⁷ Finally, there exist situations, illustrated mostly in the domain of preventive detention, where non-application of mind by the authority was manifest on the order or the circumstances of the case and the action was quashed on that specific ground.⁶⁸

It would appear that judicial energies have been comparatively exercised more over use of discretionary powers than on the issue of the validity of their conferral by the legislature upon the executive. However, the effectiveness of all the foregoing devices depends on the access to the facts available to the judicial decision-maker. In proceedings involving validity of quasi-judicial action, the requirement of reasons for a decision or a speaking order clearly gives greater ac-

⁶⁶ See Jain and Jain, pp. 410–13.

⁶⁷ *Shri Rama Sugar Industries v. State of A.P.*, (1974) 1 S.C.C. 534 per Justice Mathew dissenting, p. 547: *see also* S.P. Sathe, "Discretion and Policy; A Note on *Shri Rama Sugar Industries v. State of A.P.*," (1974) 16 J.I.L.J. 457

⁶⁸ See *supra*, footnotes 58 and 60.

cess to information on facts and grounds of the decision. In administrative proceedings, however, unless the statute mandates this, there is no requirement to give reasoned orders. The only facts and grounds which the courts have access to are usually to be found in the affidavits filed by the administration. In some cases, the Supreme Court has insisted that the administration must at least disclose to the court the reasons for its action so that it can examine the challenge of the abuse of discretionary powers.⁶⁹ But even so, the courts have no access to all the details, contained in the government records, of the decision-making. They primarily depend on the orders made by the administration and on the affidavits filed. These clearly limit the range of judicial scrutiny. The self-denying ordinance in the matter of going behind the governmental affidavits and reaching out to the actual records thus limits the effectiveness of judicial review over discretionary action. Based though it is on justifiable grounds of institutional comity, this policy stance often frustrates the claims to fairness by the victim of administrative decisions.

Added to this is the problem, from the victim's standpoint, that courts seem to believe that the higher the status of the authority invested with discretionary powers the lesser the prospect of its abuse. This has been the reason usually explicitly preferred in sustaining wide grants of discretionary powers. This attitude proliferates to the exercise of discretionary powers as well. The actions of lesser officials tend to be more closely examined than those of the more highly placed. The Commissioner of Police or the District Magistrate or the Min-

⁶⁹ See *infra*, footnote 107.

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istry's high officials, we are almost always told by the courts, are unlikely to exercise their discretion injudiciously or arbitrarily.⁷⁰ In a sense, this is a kind of "caste-based", hierarchic view of responsibility, which intangibly tends to affect the determination that discretion has been abused in a specific case when it is vested in a "high" authority.

We thus find that while the courts do not merely sustain wide conferrals of discretionary power, they also disable themselves in a variety of ways from exercising effective supervision over their exercise. They follow self-denying ordinances in matters of the "merits" of the discretionary policies or actions, and in securing greater access to facts and grounds of administrative decisions. The "caste-based" view which associates hierarchic eminence with responsible exercise of powers, despite significant empirical evidence to the contrary, also (as noted) limits the range of effective judicial invigilation. In the circumstances, it is quite accurate to say that judicial review in this area is still only peripheral" and even where it is actually available "it is not easy to get the relief sought ..."⁷¹

⁷⁰See e.g., *Kishan Chand Arora v. Commissioner of Police*, AIR. 1961 S.C. 705; *Maneka*, *infra*, footnote 87.

⁷¹Jain and Jain, pp. 88–90.

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The phenomenon of intra and inter-departmental directions or instructions provides an additional weapon in the arsenal of the administrative State. Wide powers of delegation and sub-delegation, and conferral of enormous discretionary powers on the executive thus stand reinforced by the institution of directions. *Prima facie*, such directions bind only the administrators; they do not create changes in individual's rights or status.⁷² Directions do not have any statutory force as compared with rules and regulations under statu-

⁷²*Ibid.* But often directions have been enforced: see *Union of India v. K.P. Joseph*, A.I.R. 1973; S.C. 303; *State of Uttar Pradesh v. Chandra Mohan*, A.I.R. 1977 S.C. 2411. *See also* *Dist. Registrar V. M.B. Koyakutti*, (1979) 2 S.C.C. 150, 155 for a reiteration of the view that if there are gaps in statutory rules, "Government can supplement the rule by issuing administrative instructions not inconsistent with the statutory provisions already framed or enacted." *Cf. Bant Singh v. Man Singh*, A.I.R. 1977 P & H 102

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tory powers.⁷³ But courts have not always found it easy to provide crystal-clear points of distinction between directions and rules. Many variables emerge here: "... the form of pronouncement, the procedure ... followed by the administration in issuing directions, rules or regulations, nature of rights involved" have been mentioned in judicial decisions as relevant variables.⁷⁴

It is clear that the government cannot issue directions to quasi-judicial authorities performing tasks of administrative adjudication.⁷⁵ Even a body performing executive or legislative functions, may not be subjected to executive directions if the statute does not explicitly authorise this. In one case at least, as a result of a negative judicial verdict a statute had to be amended so as to authorize the issue of governmental directions.⁷⁶ But generally statutes so provide expansively.

From a victim-oriented perspective of administrative law, one may wonder whether extensive powers to issue direc-

⁷³Jain and Jain, p. 96: *Raman & Raman v. State of Madras*, AIR. 1959 S.C. 694.

⁷⁴Jain and Jain, p. 97; *also see* *Rajgopala Naidhi v. State Transport Appellate Tribunal*, AIR. 1964 S.C. 1573.

⁷⁵*Ram Vilas Service v. Road Traffic Board*, A.J.R. 1948 Med 400.

⁷⁶*Cf.* Jain and Jain, p. 100, who raise this question call the situation only inconvenient and "confusing" for the individual. Certainly, it is more than just this. Directions have often been issued to stay or postpone effective implementation of duly enacted laws and their provisions, notably redistributive laws. This deprives citizens of the regime of benefits. Such a process is akin to an executive "stay" of legislative action, practised more frequently, but less visibly, than "stay orders" of the judiciary. This is an aspect of governmental lawlessness in India. *See* U. Baxi, *The Crisis of the Indian Legal System*, Vikas Publishing House, New Delhi.

tions to administrative authorities are really justified. This question arises because directions can often effectively impinge on rights and create obligations for individuals. No doubt these can be questioned and rendered unenforceable by proper litigative strategies. Such strategies have to cope with the problems of identification of governmental directions, a problem for which there are no determinate judicial guidelines. There is also an additional problem of access to information as the multitude of directions issued in a wide variety of statutory contexts are rarely available in a published form. Publication of directions is itself a discretionary function of the executive. The problem of identification of directions and that of continuing access to them poses difficulties for devising successful litigative strategies. Therefore, while notionally directions cannot be enforced through courts, they do operate, in quite a few sectors, as vehicles of administrative action, and even domination,⁷⁷ in addition to the vast powers of delegated legislation and discretion already heavily vested in the administration. One hopes that the new ferment in the Indian administrative jurisprudence since 1977 will extend to this problem of directions by devising more stringent patterns of accountability in administrative action.

⁷⁷A T. Markose, pp. 56–102.

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THE PROBLEM OF LIMITS TO FAIRNESS DISCIPLINE

Modern administration not only legislates for citizens and exercises wide, often uncanalized, executive powers over their lives in almost all areas of their lives, but it also adjudicates. Although administrative adjudication was not altogether miniscule in colonial India, after Independence its growth has been phenomenal.⁷⁸ There has been a steady expansion in contemporary India of justice by tribunals, whose nature, scope, personnel and structure vary enormously.⁷⁹ Legislatures creating these tribunals attempt to impose certain fairness discipline, favouring the victim of administrative deviance, by providing many a procedural safeguard, expressed through

⁷⁸E.g., S.N. Jain, *Administrative Tribunals: Existing and Proposed*, Indian Law Institute, 1947,

⁷⁹On validity of ouster clauses, *see* the classic formulation by Hidayatullah, J. in *Dhulabhai V. Madhya Pradesh*, AIR. 1969 S.C. 78: also *sa Government of Madras v. Bassappa*, A.I.R. 1964 S.C. 1873.

the rolled-up phrase “rules of natural justice”. They also provide for relative autonomy for tribunals; at the same time the scope of linkages between tribunals and courts is also structured through statutes. Some tribunals are given discretion to refer complex matters of law to High Courts through the “case stated” procedure. Statutes also provide for the exclusion of judicial intervention by the “ouster” clauses.⁸⁰ But this kind of structuring has often proved fragile, in view of the overarching powers of the Supreme Court under Articles 32 and 136 of the Constitution and that of the High Courts under Articles 226 and 227. The attempt made by the emergency 42 amendment to the Constitution to immunize tribunals from often excessive, and sometimes wayward, invigilation by High Courts through limiting their Article 226 jurisdiction⁸¹ was cancelled by a nullifying amendment after the emergency. The result is that while India has a flourishing range of adjudicative tribunals, it does not have any integrated system of tribunals nor any jurisprudential theory for the place or status of tribunals in the legal system. Both the higher courts as well as the legislatures continue to compete to impose their standards of fairness on tribunals. The rate of success in this enterprise is another matter.

As noted, the legislatures have imported certain rules of natural justice in structure and function of the tribunals. This

⁸⁰ See M.C.J. Kagzi, *The June Emergency and Constitutional Amendment, 1976*, Metropolitan; Dhavan, *The Amendment: Conspiracy or Revolution?* Wheeler, 1978; B.K. Gupta, “Administrative Tribunals and Judicial Review ...” in *Indian Constitution: Trends and Issues*, *supra*, footnote 60, p. 400,

⁸¹ See Jain and Jain, pp. 167–71.

in any case is commanded by the provisions of fundamental rights. Indian courts have, also by the constitutional compulsion, moved in the direction of classifying administrative adjudication as “quasi-judicial” and have imposed relatively strict fairness discipline on them. They have endeavoured to extend this classification, and even the regime of discipline, to bodies which may only relatively loosely be called tribunals.⁸²

More problematic, however, is the situation of administrative decision occurring outside the area of tribunalization. Is such action to be tamed by the requirements of fairness? If so, how is it to be done consistent with the claims of administrative efficiency and accountability and the institutional capabilities of the judicial system? The mix of claims and considerations here is so complex that one would a priori suggest that judicial policies will be uncertain, changeful and incapable of juristic systematization at any given point of time. Such an a priori answer would be, for a change, quite right. Let us trace, briefly, the evolution of judicial response on the matter.

It is clear that if the statute imposes, or can be read to impose, a duty on the administrator to act judicially, the courts will impose fairness discipline upon him, insisting on some observance of some principles of natural justice. Courts have operationalized this duty to act judicially in diverse ways. First, they have asked : Is there a *lis inter partes*? If there can be such a determination, the action would be regarded as quasi-judicial and some fairness obligations will attach to

⁸² See Jain and Jain, pp. 106–10; Sathe, pp. 36–50.

administrative decisionmaking.⁸³ Of course, whether the *lis* exists is a matter for the courts to determine. Second, courts have moved away from the nature of decisional situation (that is, *lis*) to the consequences of decision for the affected parties. If there ensues punishment, stigma or evil consequence, they will insist on some fairness in arriving at decisions.⁸⁴ Third, some judicial decisions tend to suggest that if an administrative decision has “civil consequences” (e.g. violation of personal rights or civil liberties or material deprivations or non-pecuniary damages) then certain fairness discipline would also be imposed, regardless of the question whether the action can, in hard doctrinal terms, be called “administrative” of “quasi-judicial”.⁸⁵ Fourth, the view that discretionary ac-

⁸³The locus classicus here is *Board of High School Education v. Ghanshyam*, A.I.R. 1962 S.C. 1767, which stresses the serious “stigma” of the decision to cancel the examinations of some students for using unfair means. of course, the court adopted the view that the function of the Unfair Means Committee was quasi-judicial; but there was an interesting divergence of judicial opinion in the High Court on the issue. One judge held that the function was administrative, yet *audi alteram partem* applied; another classified the function as administrative liberating it from any constraints of natural justice: the third judge felt that there was room to classify the action as quasi-judicial but even if it were to be called administrative, certain rules of natural justice must apply.

⁸⁴Civil rights include also right to an office, to emoluments, fixation of seniority in service, impounding of passports etc. See analysis of relevant case law in S. Gopakumaran Nair, “New Horizons of Natural Justice”, (1978) 2 *The Academy Law Review*, 253,

⁸⁵*Province of Bombay v. Khusaldas Advani*, A.I.R. 1950 S.C. 222: for a critique see Fazal, who calls it “the surprising decision”, at pp. 212–13. In *Gullapalli Nageshwar Rao v. Andhra Pradesh Road Transport Corporations*, AIR. 1959 S.C. 308, the function was held quasi-judicial, despite the

tion cannot attract the components of “duty to act judicially”, and therefore any obligations of fairness, although initially accepted by the Supreme Court, is now waning.⁸⁶ Fairness discipline extends even to such powers, even though strictly they might be called administrative and discretionary.⁸⁷ This last tendency is reinforced in recent judicial decisions.⁸⁸

Important questions attend this extension of fairness discipline. What are the requirements of fairness for an action, which on available criteria, cannot easily be subsumed under the rubric “quasi-judicial”? Must all, and any type, of “administrative” action attract the requirements of fairness discipline? Are these requirements the same as those which attach to what are called “quasi-judicial” proceedings?

Tolerably clear answers are emerging in Indian decisional law to these questions. Although it has been said that the line between “administrative” and “quasi-judicial” functions is a thin one and on its way to obliteration,⁸⁹ courts still hold that certain functions are administrative.

When certain actions are so labelled, it still remains possible to argue that fairness obligations do not at all attach.⁹⁰ But

discretionary element which was pre-eminent.

⁸⁶ See Jain and Jain, pp. 112–17 and case law there discussed.

⁸⁷ See the landmark decision in *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597 per Bhagwati, J. and the fascinating exegesis by Krishna Iyer, J. in *Mohinder Singh Gill v. Chief Election Commissioner*, AIR. 1978 S.C. 851.

⁸⁸ *Kraipak v. Union of India*. A.I.R. 1970 S.C. 2042.

⁸⁹ See e.g. *Jayantlal Amritlal v. E.N. Rana*, A.I.R. 1964 S.C. 648.

⁹⁰ See *supra* footnote 89. This seminal decision can of course be read so as to rest on the ground of miscarriage of justice or denial of equality of opportunity, a fundamental right under Article 16: see article by Nair cited

this rather general approach is qualified from time to time by specific impositions of fairness obligations on administration manifestingly acting in a non-judicial role. For example, selection of candidates for public service is admittedly an administrative function but the presence of a candidate on the selection board (despite his non-participation in consideration of his application) has been held to attract the charge of bias.⁹¹ Similarly, courts have held that some of the decisional moments in administrative process may be characterized as administrative and others as involving quasi-judicial functions. Thus the self-same decisional process may differentially attract the onus of fairness obligations.⁹² To add one more example, although many statutes require consultation with affected interests, the obligation of hearing entailed is often regarded as consisting of non-stringent and “nonjudicial” hearing. In a major decision the Supreme Court has held that a decision to raise the allowances of the workmen, which had the tendency to disturb the industrial settlement, required some kind of consultations with affected interests, although the action was administrative.⁹³

supra footnote 84.

⁹¹Jain and Jain, p. 106.

⁹²State of Assam v. Bharat Kala Bhandar, A.I.R. 1957 S.C. 1768.

⁹³Fazal, p. 213.

AUDI ALTERAM PARTEM

The maxim audi alteram partem, evolved through centuries of Western historical experience, is now a part of all civilized legal systems. But in its operationalization it has been attended with many a fascinating twist and turn in different legal systems. Much has depended from time to time on the ability of courts to classify functions as purely administrative and quasi-judicial. The requirement of a hearing to the affected individual is seen to be a necessity of justice, particularly attaching to action which has the effect of adjudicating rights or status through the exercise of public power. But the drawing of the lines has been a difficult, and often an agonizing, process for courts everywhere, as it has invariably entailed subjective appreciation of peculiar fact situations rooted in the desire somehow to balance" accountability in administration with efficiency. In India, the situation is no different, despite the fact that in view of the constitutional provisions the principles of natural justice are supposed to have much wider application in Indian law than in English law".⁹⁴

The Indian courts have struggled with two kinds of ques-

⁹⁴*Ibid.*, p. 204.

tions. First, when does the right of hearing accrue to an affected individual? Second, what ought to be the precise ambit of rights coalescing under the rubric “right to a hearing”? To expect crystal-clear answers to either type of question is to entertain some univocal, and even arrogant, conception of justice. Yet, some judicial trends appear tolerably clear. As we have already seen with respect to the first question, courts have held that a right to a hearing accrues not merely when the statutes provide for it but when statutes can be so read as to provide, particularly in the context of administrative adjudication. The courts retain the discretion to label an action quasi-judicial and thus engraft or entrench the right to a hearing even if the statute is silent.

Of course, the right to a hearing has been usually provided for by a large number of statutes in British as well as post-colonial India. “As a result”, one observer has explained, the “Indian courts developed a habit of looking to statutes for rules of hearing”.⁹⁵ This judicial working habit, or style, has extended itself in support of a rule of interpretation that if the statute is silent on the requirements of hearing, such requirements may be read into them as a responsible legislature could not be deemed to have excluded by implication a time-honoured principle of justice. This approach is greatly facilitated in India by the provisions of fundamental rights, especially by Article 14 guaranteeing equality before the law.

But despite the requirements of the fundamental rights provisions, there remains considerable uncertainty as to whether statutory exclusion, in express terms, of the right

⁹⁵A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27.

to a hearing would be held justified. It appears to be the accepted position that statutes so excluding hearing in areas which do not directly affect any fundamental rights would be constitutionally valid. As for the statutes affecting fundamental rights, the Indian Supreme Court has wavered in its approach during the last twenty-seven years, from Gopalan⁹⁶ to Maneka.⁹⁷

In Gopalan some Justices went so far as to suggest that the fundamental right not to be deprived of life and personal liberty save by "procedure established by law" really meant that Parliament can prescribe any law so long as it is within its competence. Twenty seven years saw some attenuation of this judicial views culminating in Maneka. But even this historic decision does not fully entrench the requirement of the right to hearing as an an essential attribute of law prescribed by Parliament. In Maneka, the court first reads a right to hearing in the Passport Act as an implicit statutory prerequisite for impounding of passports and then proceeds to hold that in some situations even a post-decisional hearing will suffice.⁹⁸ The notion of post-decisional hearing as satisfying

⁹⁶See *supra*, footnote 87.

⁹⁷The court here reads first a right to hearing the Passport Act; it then converts this right into a right to a post-decisional hearing. Audi alteram partem rule was not to be readily eschewed, even though it may "suffer from situational modifications"; on the other hand, the "rule should not have the effect of paralyzing the administrative process or the need of promptitude or the urgency of the situation". A "remedial", but "genuine", post-decisional hearing was thus prescribed.

⁹⁸See for a critique, U. Baxi, *The Indian Supreme Court and Politics*, 1980, Eastern Book Co., M.P. Singh, "Administrative Action in Violation of Natural Justice Affecting Fundamental Rights: Void or Voidable". (1979)

fairness requirements in the area of fundamental rights is a novel addition to the audi alteram partem rule; an addition, however, of dubious significance in terms of development of an ethos of legality in administration.⁹⁹

The right to a hearing of course, means the right to a meaningful hearing and not a right to the ritual of hearing, an “empty exercise in public relations”.¹⁰⁰ This is easy to state in the abstract. But what constitutes meaningful hearing is a question on which judicial practice varies. There is consensus that effective notice is essential to the right of being heard.¹⁰¹ But beyond that there is considerable diversity of approach and views. “Hearing” does not necessarily mean personal hearing through parties appearance before the decision-maker.¹⁰² All that the reasonable hearing standard requires is that adequate opportunity be given to the party concerned to present his point of view on allegations or disputes.¹⁰³ This shifts the focus of discussion to what constitutes “effective” or “adequate” hearing.

Indian courts have broadly held that effective hearing implies access to information and access to the adjudicating authority by the affected individual. The authority must disclose all materials, evidence and information relevant to

2 S.C.C. (Journal) 1; S.N. Jain, “Administrative Law Aspects of Maneka Gandhi, 1979, J.I.L.I.”

⁹⁹ Maneka Gandhi, *supra*, footnote 87 at p. 630.

¹⁰⁰ Jain and Jain.

¹⁰¹ *Ibid.*, pp. 192–93; Sathe, pp. 174–76.

¹⁰² *Ibid.*

¹⁰³ Dhakeswari Cotton Mills v. C.II., A.I.R. 1955 S.C. 65; *see* the discussion of decisional law in Jain and Jain, pp. 193–200; Sathe, pp. 181–83.

the decision on issues involved; and the individual should have the opportunity to rebut this material.¹⁰⁴ In addition, the authority must receive from the affected individual all relevant material which he wishes to produce.¹⁰⁵ The right to an effective hearing does not frequently include a right to cross-examine witnesses, except in rather special circumstances,¹⁰⁶ nor right to counsel as a matter of entitlement.¹⁰⁷ As regards the requirement of reasoned decisions, until 1965 judicial insistence was lacking; now quasi-judicial bodies are required to give some reasons for their decisions, although the question of their sufficiency remains a vexed one.¹⁰⁸ It remains particularly vexed on the issue of whether the appellate authority must give a reasoned decision even when it agrees with lower authority. Some decisions since 1965 suggest that such authorities were required to give reasons, whether in agreement or in difference from the initial decisions.¹⁰⁹ But in 1973 the Supreme Court has ruled that reasoned decisions are required to be given on review only if it differs from the

¹⁰⁴*Ibid.*

¹⁰⁵Sathe, pp. 176–77; *see also* the interesting decision, having distinctive cultural overtones, *Hira Nath v. Rajendra Medical College*, AIR. 1973 S.C. 1260.

¹⁰⁶Sathe, pp. 178–81.

¹⁰⁷E.g. *Bhagat Singh Raja v. Union of India*, A.I.R. 1967 S.C. 1606; *M.P. Industries v. Union of India*, AIR, 1969 S.C. 671; *Travancore Rayons v. Union of India*, A.I.R. 1971 S.C. 862.

¹⁰⁸*Tara Chand v. Delhi Municipality*, A.I.R. 1977 S.C. 567. For critique see M.P. Jain, 13 A.S.I.L. 451 at pp. 465–69; M.P. Singh, “Duty to Give Reasons For Quasi-Judicial and Administrative Decisions”, 21 JILI 45 (1979).

¹⁰⁹Sathe, pp. 162–70; Jain and Jain, pp. 176–85.

initial decision.¹¹⁰

The difficulties in determining the ambit of the audi alteram partem, maxim and related rules and standards arises because of the infinite diversity of contexts of decisions coming on review before the Indian High Courts and the Supreme Court. These contexts include administrative adjudication on matters relating to (for example) labour, revenue (tax, customs, excise), trade (licensing, imports and exports, foreign exchange transactions, business, industry, banking, transport, acquisition and requisition of property, agrarian reform, university litigation, and civil service under the state. Obviously, in such a heterogeneous mix of matters different policy problems and issues arise. Judging each case or each type of situation on its particular context naturally provides the easier way out. Moreover, the increasing volume of administrative (and other) litigation coupled with highly fluctuating bench-structure (permitting little or no specialization in any particular field development and equally variable judicial tenures on the bench contribute to diverse judicial styles or extension of the principles of natural justice to different domains of administrative adjudication and administrative activity. Both the heterogeneity of the subject matters in administrative litigation and the institutional capacity of the judiciary to evolve and sustain coherent patterns of decision on basic issues of natural justice contribute to limit effective use of judicial power produce greater accountability in the exercise of administrative power.

¹¹⁰Jain and Jain, pp. 176-77; Kraipak v. Union of India, A.L.R. 1970 S.C. 150.

BIAS

Indian courts have generally followed the classification of bias situations, as violative of *nemo iudex* rule, into three categories: personal, pecuniary and official or departmental. The test formulated in respect all the three types for proof of bias is the test of “reasonable likelihood” of a biased exercise of decision-making power or discretion. This formulation demands a substantial demonstration of the possibility of bias.¹¹¹ There are, however, instances when the Supreme Court has considered even “suspicion about bias” as discharging the burden of proof for allegation of personal bias.¹¹² One situation in which suspicion of bias was accepted as a ground for invalidating proceedings involved the question of professional standards in the practice of law. A person who had alleged professional misconduct against an advocate

¹¹¹ *Manak Lal v. Prem Chand*, A.I.R. 1957 S.C. 427. *See also* observations of Justice Beg in *Maneka Gandhi, op. cit., supra*, footnote 87 where he maintains that the petitioner has to be protected not just against the violation of her rights but even “appearance of such prejudice or bias” in her mind concerning the integrity of the decision-process. *See U. Baxi, op. cit., supra*, footnote 98.

¹¹² *See* footnotes 115, 116, 117, *infra*, and the related text.

was once a client of the Chairman of the enquiry committee. (The Chairman was a senior lawyer himself and had held the position of the Advocate-General of the State). The Supreme Court was clear that the Chairman had no personal contact with the complainant and that there was no reasonable likelihood of a biased decision favouring complainant because of the previous professional association. And yet it held that the Chairman was disqualified not because he was likely to be biased but because justice must not only be done but “seem to be done to the litigating public”.¹¹³ The “suspicion of bias” test rests on an inference of apprehension of unfairness in the mind of the affected individual; and in that sense it is individual or victim-oriented as against the “reasonable likelihood test” of bias which is authority or institution-oriented. The latter, however, appears to be the dominant test.

But while questions concerning the nature of tests to be applied in determining personal or pecuniary bias are basically related to the personality of the decision-makers and their relation with other people having possibilities of influencing the instant decision), it is the doctrine of official bias which is structurally the more significant. A large number of decisions in the context of planned development have to be taken by the executive acting under discretionary and delegated powers. The executive authorities have naturally an interest, and their role obligations might even dictate vigorous pursuit in following certain policies of planned development. In other words, they may be biased in favour of

¹¹³Gullapalli Nageswar Rao v. A.P. Road Transport Corporation, A.I.R. 1959 S.C. 308.

certain policies but the kind of predisposition may appear to an affected individual as unfair. Advance determination of detailed policies may in reality mean, and often does, prior determination of outcomes for affected individuals. To invalidate outcomes on the solo basis of official predispositions, and even commitment to certain policy, would be to place demands of individuation beyond the bounds of bureaucratic policy-making. But to refuse to monitor outcomes at all on the ground of official bias would not mean merely denial of relief to affected people but also, in the long run, result in sapping their legal initiative to challenge what appear to them to be excesses of power and authority and thus also in the long run to dry up a source of judicial power over the administration. All these considerations have surfaced in some of the leading Indian decisions; their importance lies in terms of a “balancing” of all the foregoing factors. The resultant posture of judicial action naturally remains somewhat indeterminate. We take one example.

Many road transport nationalization statutes confer power on the Secretaries and Ministers concerned with the subject to approve schemes of nationalization prepared by the statutory transport authorities, under statutes which provide for one or the other mix of requirements of natural justice. When disputes arise between operators under the threat of nationalization and the State, the Supreme Court has clearly held that proceedings to determine the dispute as quasi-judicial.¹¹⁴ This characterization immediately brings

¹¹⁴Gullapalli Nageswar Rao v. A.P. State Road Transport Corporation (commonly called Gullapalli II), A.I.R. 1959 S.C. 1376. *See also* Deshpande,

determinations under judicial review on the ground, *inter alia*, of bias. The court has invalidated the determination by the Secretary of transport department who heard the transport operators' objections to nationalization on the ground of bias.¹¹⁵ But when instead of the transport Secretary, the Minister in charge of transport himself heard the objections, the court held that allegations of official bias against the Secretary, upheld by it as valid, cannot be extended to a Minister who was the head of the department.¹¹⁶ The Minister was held not so closely identified with the departmental policies as the Secretary of a department. But the court was to later qualify this posture. It clarified that the doctrine of bias is qualified by the extent of statutory authorization. In other words:

The Minister or the officer of the Government who is invested with the power to hear objections to the scheme is acting in his official capacity and, unless there is reliable evidence to show that he is biased, his decision will not be called in question, merely because he is a limb of the Government.¹¹⁷

The "reliable evidence" of official bias is hard to adduce. If the Minister makes public speeches affecting the course of road transport nationalization policy, can he thereafter sit in judgement over the objections of affected operators? The Supreme Court appears to have left open the possibility

«The One who Decides must Hear», 1959–60 J.I.L.I. 423.

¹¹⁵Kondala Rao V. A.P. State Transport Corporation, A.I.R. 1961 S.C. 90.

¹¹⁶See e.g. Nageswara Rao v. State of Andhra Pradesh, A.I.R. 1969 S.C. 1376, pp. 1381–83

¹¹⁷See *supra*, footnote 116 (emphasis added).

that if the Ministerial speeches indicate final and irrevocable policies which, in concrete terms affect certain individuals, then his hearing of objections would not be any more than a formality; such a situation may invite valid allegations of official bias. But this possibility does not operate as a thin end of a wedge. The very cases which left open this possibility also demonstrated that reliable evidence of such a final and irrevocable decision would be hard to come by: in the instant case it was easy for the court to say that clippings from a newspaper of what the Minister said cannot be held to be reliable evidence for what was attributed to him in the reports may be inaccurate. Parties alleging official bias in such cases have to establish the journalistic competence of news reporters. Only a situation when the officially released full texts of Ministerial speeches become available can some evidence be found; but even this has to be reliable in the sense that it shows to the satisfaction of courts that a final and irrevocable decision affecting the parties was contained in such texts. Public utterances do not predetermine concrete issues in law, even though they may have the tendency in fact to do precisely that.¹¹⁸ Similarly, if a Minister is to hear objections but chairs a meeting prior to hearing objections which takes the decision to nationalize the very routes on which objections are to be shortly heard, this does not disqualify the Minister from adjudicating the dispute under the statute. This is because departmental decisions must be read as subject to the provision of the statute. When these latter require hearing of objections, no prior decision can be said to have become final

¹¹⁸Kagzi, pp. 377-89.

and irrevocable.¹¹⁹

Thus, given the overall judicial posture, the doctrine of official bias is not an important strategy for securing administrative accountability through the exercise of judicial power. The “balancing” of interests in this area may be more aptly described as a process of accommodation and legitimation of the rather substantial executive powers in the hands of the administration. The judicial insistence on accountability then shifts to other aspects of natural justice requirements, including the *audi alteram partem* rule, an aspect which we have earlier examined.

¹¹⁹India v. Ralli Ram, A.I.R. 1963 S.C. 1685; Chatrabhuj v. Maheswar, A.I.R. 1954 S.C.; Bhikharaj Jaipuria v. India, A.I.R. 1962 S.C. 1113.

CONTRACT ADMINISTRATIF

The Indian State continues to be a significant economic entrepreneur engaged in a vast variety of transactions with individual and groups. The Indian Constitution envisaged an increasing role for the State's economic and trading activities and has provided specifically, in Article 299, for government contracts. Government contracts must be expressed in the name of the President of India or Governors of States. All contracts and assurances of property" are to be executed on behalf of these heads of State, who have to authorize the manner of their execution. Personal liability for governmental contracts for the heads of State, or for any official of the State, is explicitly foreclosed.

The judiciary has taken the view that Article 299 is an important provision, safeguarding the functioning of the State as an economic agent from undue liability. Judges have, therefore, tended to approach the requirements of the article somewhat strictly. There are decisions holding that if the contract is not in writing or is not expressed on behalf of the head of

State or is not in accordance with the procedure and form prescribed under Article 299, no legal action against the government may lie.¹²⁰ Such contracts may be unenforceable even through commercial arbitration.¹²¹ The judiciary has taken rather strict view of the term “executed”; it is doubtful, as a matter of law, whether Indian courts would accept the plea that correspondence between the government agency and an individual or a firm gives rise to an enforceable contract in terms of Article 299.¹²² Undoubtedly, in many instances this kind of judicial approach savours of accommodation between the executive and the judiciary at the expenses of justice to the affected individual.

But the judiciary has not altogether denied relief to parties in such situations. It has been held that if the government derives any benefit out of an agreement, violative of Article 299, it is liable to compensate the party under the Indian Contract Act. Under Section 70 of that Act a kind of “quasi-contractual” liability for restitution would arise in these circumstances.¹²³ In enforcing section 70 as binding as much on the State as it is on individuals, courts have thus insisted that the law of

¹²⁰India v. Ralli Ram, A.I.R. 1963 S.C. 1685.

¹²¹Jain and Jain, pp. 485–88; Kagzi, 377–89; Sathe, 277–84: *see also* V. Ramasheshan, “State Contracts in Indian Law”, (1964) 13 Indian Year Book of International Affairs 275.

¹²²*See e.g.*, State of West Bengal v. Mandal, A.I.R. 1962 S.C. 779; New Marine Coal Co. v India, A.I.R. 1964 S.C. 152; Mulam Chand v. State of M.P., A.I.R. 1968 M.P. 152.

¹²³Ganges Manufacturing Co. v. Sourujmull, (1880) ILR 5 Cal. 669: 5 CLR 533. This fact was proudly noted recently by the Supreme Court in the case cited in footnote 125, *infra*.

the land binds everyone, including the government as an aspect of the rule of law notion in action. Doctrinally, however, they have taken the view that Section 70, in its application to government contracts, does not embody any notion of implied contracts (not permissible under Article 299). Rather, it is based on the equitable notion of restitution; extension of this notion is then easily justified as even the officers of government may find it necessary or expedient to enter into transactions in forms not valid under Article 299. In this sense, courts assist the administration in securing internal accountability within the bureaucracy; they also attempt to restore the status quo *ante*, as far as possible for the affected parties through restitutory devices.

The other equitable gateway out of the rigours of Article 299, as judicially construed, is doctrine of promissory estoppel which emerged in India as early as 1880,¹²⁴ and which has been applied rather well by the Supreme Court of India. Generally speaking, the courts have held that an assurance held out by a government agency, which is not against a statute on the basis of which a party has altered its position is binding against the government. They have so held on the grounds of equity and more importantly those arising from the rule of law values.¹²⁵ All that the petitioner should prove is that he

¹²⁴ See the notable decision in *Union of India v. Indo Afghan Agencies*, A.I.R. 1968 S.C. 718; *also see* *Collector of Bombay v. Municipal Corporation of City of Bombay*, A.I.R. 1951 S.C. 469; *Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council*, A.I.R. 1971 S.C. 1821.

¹²⁵ *Motilal Padampat Sugar Mills v. State of U.P.*, (1979) 2 S.C.C. 409, 451.

had “altered” his position as a result of the assurance; “alteration” may not be accompanied by any damage or detriment. As the Supreme Court has recently formulated the test: “The detriment in such a case is not some prejudice suffered by the promisee by acting on the promise but the prejudice that would be caused to the promisee.”¹²⁶ The plea of “executive necessity” to resile from the promise is available to the government against the plea of estoppel; but it is clear that such necessity will have to be shown as overwhelming other countervailing public interests raised by the plea of estoppel.¹²⁷ Once again we find the Indian judiciary boldly shaping out a relief from the rigours of Article 299 on the basis of equity, rejecting the argument that all that is involved in an estoppel situation are contracts prohibited by Article 299.

The third mechanism to escape the rigours of law is the depage of the contractual process between government agencies and citizens and companies. Once the contract is executed their relation is governed by the terms of contract and¹²⁸ or statute if it is a statutory contract. But courts have held that the process of entering into a contract is the executive action of the State and the requirements of fairness attach to each of the stages of contract formation, in view of the guaranteed right to equality before the law and of the fundamental values of the rule of law (now also comprising

¹²⁶ *Ibid.*, pp. 442–43; see also N.N. Nair, “The Doctrine of Promissory Estoppel in Indian Public Law”, (1977) 1 *Academy of Law Review* 118.

¹²⁷ See *V. Punnen Thomas v. State of Kerala*, A.I.R. 1969 Ker. 81, 86. Also see generally *Radhakrishna Agarwal v. State of Bihar*, A.L.R. 1977 S.C. 1496; *E.E. and Co. Ltd. v. State of West Bengal*, A.L.R. 1975 S.C. 266.

¹²⁸ See note 111 and text accompanying, *infra*.

the basic structure). This means, for example, that the government may not, without affording an opportunity of hearing, blacklist any trader or contractor for the purposes of government contracts: that any kind of discrimination at the threshold is prohibited by the Constitution.¹²⁹ In a recent case, the Supreme Court has extended the fairness obligation also to statutory corporations, considering these as “State” under Article 12 of the Constitution.¹³⁰

In all these three respects, the Indian judiciary has made very worthwhile contributions to administrative jurisprudence. The same may be said, despite the wayward pattern of judicial responses, concerning the problem of tortious liability of the government, an aspect to which we now turn.

¹²⁹ *Setty v. International Airport Authority, Bombay*, judgement delivered on May 4, 1979.

¹³⁰ *P & O Steam Navigation Co. v. Secretary of State*, 5 Bom. H.C.R. App. 1.

CONTRACT ADMINISTRATIF

GOVERNMENTAL LIABILITY IN TORT

Nearly thirty years after Independence, the Indian legal system has yet to find an adequate answer to the question of the liability in tort by governmental actions. Not merely has any legislative solution been attempted to solve the problem of compensation for injuries caused to Indian citizens out of the routine activities of governmental agencies, but also the government has usually put forth the defence of sovereign immunity whenever compensation claims have been pressed, as if the directive principles and the preamble to the Constitution did not exist! The courts too have been confronted with a decision made by the Calcutta Supreme Court in 1861!¹³¹ Under that ruling "there is a clear distinction between acts done in the exercise of ... Sovereign power, and acts done in the conduct of undertakings which might be carried on by private individuals without such powers delegated to them".¹³² Indian courts have yet to repudiate this distinction, although

¹³¹ *Ibid.*, p. 13.

¹³² *State of Rajasthan v. Vidyawati*, A.I.R. 1962 S.C. 933.

they have bypassed it or manipulated it in a large number of cases, in favour of the victim of injuries caused by State operations. In 1962, deciding the question of the liability of the government for the reckless and negligent driver of a government vehicle which fatally injured a pedestrian, the Supreme Court ruled that in a "Republican form of Government" with an avowedly socialistic Constitution "there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious acts of its servants."¹³³

The promise of this decision was somewhat dissipated in 1965 when the court held that the theft of gold kept in police custody on suspicion that it was stolen property did not establish a claim for tortious liability since under the 1861 "precedent" the State cannot be held liable, law and order activities being an aspect of the sovereign function. This decision has been, rightly, criticized by juristic writings¹³⁴ and seems to have had little adverse impact on the High Courts, which have almost consistently denied attribution of sovereign function to diverse governmental activities such as use of military vehicle for carrying sporting teams of the Indian Air Force,¹³⁵ or transportation of records and equipment or¹³⁶ overflowing of a reservoir constructed by the State.¹³⁷ In a recent decision,

¹³³ *Kasturi Lal Ralia Ram Jain v. State of Uttar Pradesh*, A.I.R. 1965 S.C. 1309. See the comment by A.R. Blackshield, "Tortious Liability of Government: A Jurisprudential Case Note", (1966) 8 JILJ. 279; A. Jacob "Vicarious Liability of Government in Torts", (1965) 7 J.I.L.I. 246.

¹³⁴ *Satyawati v. Union of India*, A.I.R. 1967 Del. 98.

¹³⁵ *Union of India v. Sugarabai*, A.I.R. 1969 Bom. 13.

¹³⁶ *Mysore v. Ram Chandra*, A.I.R. 1972 Bom. 93.

¹³⁷ *Shyam Sunder v. Rajasthan*, A.I.R. 1974 S.C. 890: See also *Pande*,

the Supreme Court also negated the plea that famine relief was a sovereign function and therefore no compensation was due to the widow of a pedestrian run over by a defective truck used in the relief operations.¹³⁸

What is striking in this situation is that the State should be contesting such matters as far as the Supreme Court of India and that the courts, while giving relief, should still be nominally adhering to, rather than expressly repudiating, the 1861 test distinguishing between sovereign and non-sovereign functions, so uncontemporaneous today. The very first report of the Indian Law Commission in 1956 urged legislative abolition of this distinction and courts have repeatedly endorsed this recommendation. A bill introduced in 1965 lapsed in 1967; since then Parliament has not found this item to be one deserving high priority on the legislative agenda. It is much to be hoped that the Supreme Court of India, without waiting for any further legislative action, bids farewell to this colonial doctrine, making it difficult for citizens of India to claim compensation for injuries they suffer as a result of the growing volume of State activity in all domains of Indian life.

"Perforating the Epscutcheon of Sovereign Immunity", (1974) 2 S.C.C. (Journal) 9.

¹³⁸Jain and Jain, p. 512.

GOVERNMENTAL LIABILITY IN TORT

NON JUDICIAL FORMS AND PROCESSES FOR ACCOUNTABILITY IN ADMINISTRATION

It is only at the very end of their massive commentary on developments in Indian administrative law that two widely read authors acknowledge that as a “control-mechanism, courts play only a marginal role” Judicial control “of administrative action”, they conclude, is helpful to the extent it is available. But that extent is severely limited by several factors surveyed so far.¹³⁹ As a result, the contest between the government and the individuals becomes a very unequal one” and a large number of public grievances against the administration go unrectified”.¹⁴⁰ This informed conclusion bears out the view expressed at the beginning of this paper that the judicial process has not given its self-denying ordinances and the politics

¹³⁹ *Ibid.*, p. 514.

¹⁴⁰ *Ibid.*

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of accommodation of power between executive and judiciary, much to offer by way of structural solutions to the everyday excesses of power by the administration.

By the same token, the non-judicial methods of ensuring accountability in administration are also not successful at the structural level in generating an ethos of legality in administration. These include: the legislatures (and their specialist committees), the party political process, the investigative and enforcement agencies and the media as a shaper of public opinion on priorities for political action. Any generalization on their overall effectiveness requires close empirical examination of the processes and structures through which accountability in various senses of that term) is sought to be ensured. Available literature, supplemented by intuitive understanding, indicates only general even if tentative conclusions.

In terms of redressal of grievances against the administration, political processes appear to be doing as good, if not better, job as judicial control. Access to a political personage (M.P. or a member of a state legislature or a party official) does often bring positive results for people concerned. Through kinship and ethnic networks, access to such sources appears extensive but even so access to political personages by a large mass of grievance-inflicted citizens seems very limited.¹⁴¹ Media—mainly newspaper and periodicals—have played a useful role in settlement of individual grievances though their grievance columns; but the system of newspapers ombudsmen has not yet been carefully studied in India.

¹⁴¹ See e.g., A.P. Barnabas, *Citizens' Grievances and Administration*, 1969, Ind. Inst. Pub. Admn.

Apart from grievance columns, however, the media priorities do not so far involve investigative journalism related to individual grievances. Investigative and enforcement agencies are responsive to grievances of people with high socio-economic status. Correspondingly, senior officials are broadly more responsive than the grassroots ones to demands for investigation and enforcement in matters affecting individuals. But it remains true that the only effective method of mobilizing enforcement agencies is the Gandhian one of direct, non-violent action. This is most often employed by change-agents and movements on the countryside in a wide variety of contexts involving abuse and non-use of public powers (e.g. when police refuse to register cases against the local notables mainly the rural rich).¹⁴² But resort to direct action to correct abuses of power or generate compliance with the law or the use of discretionary power by officials also extends now to urban areas.¹⁴³ Even so, the method of direct action has been used only episodically, for a variety of reasons, as a control mechanism over the administration.

As distinct from grievances involving specific cases and individuals, the abuse of power in the form of corruption has

¹⁴² Participatory organizations of rural poor, and Sarvodaya movement, rely on this technique to make the police perform their duties under the law. *See e.g.*, U. Baxi, "From Takarar to Karar: The Lok Adalat at Rangpur" (1976) X J. Constitutional and Parliamentary Studies 53.

¹⁴³ Quite recently, women's groups in Delhi resorted to direct action to ensure prompt investigation and prosecution of in-laws and husbands involved in bride-burning cases, where the newly married bride commits self-immolation by sprinkling kerosene on herself owing to difficulties caused by her new relatives, mostly over the dowry issue.

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been high on the national agenda. There is, of course, as Gunnar Myrdal pointed out, not just the fact of corruption but a folklore about corruption.¹⁴⁴ These two levels of corruption, as it were, mutually reinforcing each other add further complexities to the problem of understanding corruption as an aspect of political and governmental process in a developing society, the bulk of whose people live beyond a niggardly axed poverty line. But for our present purposes corruption may be perceived as a kind of administrative deviance or abuse of power. While illegal gratification is an offence under the Penal Code, and there is a special law called the Prevention of Corruption Act, the small number of prosecutions under both indicates the inability of people to mobilize the law to correct the abuse of power and the posture of the legal system which provides disincentives for such pursuits by people.¹⁴⁵

The legislative processes and the media have played a comparatively more decisive role in exposing corruption in high and low places than they have in dealing with grievances of individuals and groups exposed to excesses of powers or non-performance of public duties. The impact of these efforts is rather hard to measure. The use of the Commissions of Enquiry Act, 1952 with a view to find facts, has been the standard response of governments to exposes of corruption. However, it is notorious that the Commissions of Enquiry (is fact-finding bodies and no more) are usually mobilized by incumbent politicians against opponents who are out of office;

¹⁴⁴G. Myrdal, *The Asian Drama: An Enquiry into the Poverty of Nations*, 968, pp. 940–41.

¹⁴⁵For a description of legal provisions *see* Kagzi, pp. 164–67.

and even so, very little enforcement action follows in the wake of the Commission reports.¹⁴⁶ There exists at the Centre, and in some States, the Vigilance Commission. The Central Vigilance Commission, an outcome of the highly frank and disturbing Santhanam Committee Report in 1962, is established by a Cabinet Resolution and its main brief is to exercise vigilance over civil servants and public undertakings. It advises the government concerning disciplinary action against civil servants and in regard to grants of prosecution in cases investigated by the Central Bureau of Investigation.¹⁴⁷ Not much empirical literature exists to justify any worthwhile conclusions concerning the effectiveness of the Commission.

The Ombudsman idea has had a chequered career in India so far.¹⁴⁸ But it has taken legislative shape in as many as five Indian States in the period 1970–1975, and legislation was pending, as in 1975, in at least two more States.¹⁴⁹ At the Union level, a bill to introduce the Lokpal (Hindi equivalent of Ombudsman) introduced in 1969, lapsed owing to the dissolution of the Lok Sabha; another bill was introduced in 1971 and yet another in 1977, both of which have now lapsed.

¹⁴⁶ See A.G. Noorani, *Ministers' Misconduct*, 1973, New Delhi, Vikas Publishing House.

¹⁴⁷ Kagzi, pp. 167–68.

¹⁴⁸ See M.P. Jain, *Lokpal: Ombudsman in India*, 1970; S.K. Agarwala, *The Proposed Indian Ombudsman*, 1971; S.P. Sathe, "Lokpal and Lokayukta: The Indian Ombudsman", 1969, *J. of University of Bombay* 265; D.C. Rowat, "The Indian Ombudsman Proposal: The Proposed Ombudsman System for India", (1971) 5 *J. Const. and Parliamentary Studies* 285; R. Dhavan, "Engrafting the Ombudsman Idea on a Parliamentary Democracy: A Comment on the Lokpal Bill 1977" (1977) *J.I.L.I.* 257.

¹⁴⁹ R. Dhavan, *supra*, footnote 147, pp. 265–66.

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One can, in the circumstances, only refer to the conceptions of Lokpal in the existing legislations and bills and the experience of the working of the institution in some States.

Under the 1971 Bill, followed in some States, the Lokpal had the jurisdiction to examine “grievances” as well as “allegations”. The latter were defined to refer to corruption involving “personal interest, or improper or corrupt motives” in the discharge of public functions, and lack of integrity or improper conduct in his capacity as a public servant”). The former relates to claim that a person has “suffered sustained injustice or undue hardship in consequence of maladministration”. “Maladministration” has been defined in terms of practices, procedures, and actions which are “unreasonable, unjust, oppressive or improperly discriminatory” or as involving “negligence” or “undue delay”. Grievances can be brought before the Lokpal by anyone affected by maladministration; “allegations” could be made by any person who is not a civil servant. Complaints were contemplated under the bill against a wide range of persons including all Ministers (barring the Prime Minister of India) and all other departments, companies, statutory corporations under the Union government.

In contrast, the 1977 Bill does not clearly maintain the distinction between “corruption” and “maladministration”. It takes as its focus “misconduct” by “public men” the definition of “public men” does not include the bureaucracy. The 1977 Bill further provides that the Lokpal has no jurisdiction over matters pending before the Commissions of Enquiry; this gives the government an option to make a preemptive strike by referring a matter likely to come before the Lokpal to

Commission. The Lokpal, under the 1977 Bill, is open to the charge of bias. Such a charge is to be resolved by the President after obtaining the opinion of the Chief Justice of India. This clause could result in demoting the status, and interfering with the functioning, of the Lokpal.¹⁵⁰

The main point is that the Ombudsman idea in India is currently more centred on corruption than on redressal of grievances against the administration. This is an important shift but one that is likely to continue to leave the citizen short-changed. Indeed, it has been said that the present conception of the Lokpal, in the 1977 Bill, means that the institution will no longer be used to make the day to day administration more amenable, human and humane” and that it is primarily designed to be used as a weapon in political warfare among professional politicians.¹⁵¹

It appears that the 1971 model has influenced the conception of Lokpal in at least six States; the 1977 model is manifest in two or three States.¹⁵² On available information for Maharashtra, the Lokpal has handled a considerable number of grievances;¹⁵³ lawyers have been heavily involved in complaints “as supporting affidavits are required in most cases”.¹⁵⁴ The Lokpal in Maharashtra has been engulfed in acrimonious political controversy as well.¹⁵⁵

It would appear from all this that the non-judicial means

¹⁵⁰ Dhavan, *supra*, footnote 147, p. 274.

¹⁵¹ *Ibid.*, p. 281.

¹⁵² *Ibid.*, p. 266.

¹⁵³ Sathe, pp. 326–39.

¹⁵⁴ Dhavan, *supra*, footnote 147, pp. 266–67.

¹⁵⁵ *Ibid.*

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of redressal against abuse of power or administrative deviance are as tenuous and weak, structurally, as the judicial ones. The steady expansion in administrative powers has not been accompanied by a similar expansion in accountability. Herein lies a major facet of the crisis of the Indian legal system, and the underlying ideology of legal liberalism.¹⁵⁶

¹⁵⁶U. Baxi, *The Crisis of the Indian Legal System*, New Delhi, Vikas Publishing House.